

CONCURRING OPINION OF FOLEY, J.  
WITH WHOM WATANABE, J. JOINS

I concur. I do not agree that Ng waived his ineffectiveness of counsel claims by not raising them "at the trial, [or] on appeal." Hawai'i Rules of Penal Procedure (HRPP) Rule 40(a)(3).

Ng's ineffectiveness of counsel claims were based on matters outside the appellate record. Ng claims his trial counsel was derelict in failing (1) to investigate the utility workers and other police officers allegedly on the scene and (2) to obtain the police commission report. These matters could not have been raised on appeal because an appellate court "cannot consider evidence outside the record." State v. Moses, 102 Hawai'i 449, 455, 77 P.3d 940, 946 (2003) (citing Hawaii Revised Statutes (HRS) § 641-2 (1993)). Additionally, Ng had no "realistic opportunity" to raise his ineffectiveness of counsel claim at trial while he was represented by the counsel he claims was ineffective. Briones v. State, 74 Haw. 442, 459, 848 P.2d 966, 975 (1993).

The circuit court did not err in denying Ng's HRPP Rule 40 Petition without a hearing because Ng's allegations showed no colorable claim. Stanley v. State, 76 Hawai'i 446, 449, 879 P.2d 551, 554 (1994). As to Ng's ineffectiveness of counsel claims,

Ng failed to "establish specific errors or omissions of defense counsel reflecting counsel's lack of skill, judgment or diligence . . . [and] that these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980) (citations and footnote omitted).